TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

1. The Fifteenth Amendment Forbids Only the Conditioning of Suffrage on Race, Color or Previous Condition of Servitude 4

   (a) The Text 4

   (b) Legislative History 5

   (c) Judicial Decisions 10

2. The Virginia Poll Tax Does Not Violate the Fifteenth Amendment 11

   (a) The Poll Tax Laws of Virginia Are Not Discriminatorily Administered 11

   (b) The Motives of the Framers of the Poll Tax Requirement Are Irrelevant 13

   (c) The Economic Statistics Cited by Appellant Do Not Establish a Violation of the Fifteenth Amendment 15

CONCLUSION 22

CITATIONS

Cases

Arizona v. California, 283 U.S. 423 (1931) 14

Breedlove v. Suttles, 302 U.S. 277 (1937) 19

Butler v. Thompson, 97 F. Supp. 17 (E.D. Va.), *aff'd per curiam*, 341 U.S. 937 (1951) 12, 14, 15, 20

Butts v. Harrison, Civ. No. 3912 (E.D. Va. May 18, 1964) 16

Page

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 13, 14

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 10

Guinn v. United States, 238 U.S. 347 (1915) 5, 10, 19

Harman v. Forssenius, 380 U.S. 528 (1964) 14

Harper v. Virginia State Board of Elections, No. 48, O.T. 1965 ..... 1, 2, 15, 21

Lane v. Wilson, 307 U.S. 268 (1939) 10

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) 11, 21

Myers v. Anderson, 238 U.S. 368 (1915) 19

Pirtle v. Brown, 118 F. 2d 218 (6th Cir.), *cert den.*, 314 U.S. 621 (1941) 19

Reynolds v. Sims, 377 U.S. 533 (1964) 18

Sanchez Morales & Co. v. Gallardo, 15 F. 2d 550 (1st Cir. 1927) 20

Saunders v. Wilkins, 152 F. 2d 235 (4th Cir. 1945), *cert. den.*, 328 U.S. 870 (1946) 19

Schnell v. Davis, 336 U.S. 933 (1949), *affirming per curiam* 81 F. Supp. 872 (S.D. Ala. 1949) 11

Smith v. Allwright, 321 U.S. 649 (1944) 10

South Carolina v. Katzenbach, No. 22, Original, O.T. 1965 9

Tenney v. Brandhove, 341 U.S. 337 (1951) 14

United States v. Dogan, 314 F. 2d 767 (5th Cir. 1963) 12

United States v. Louisiana, 380 U.S. 145 (1965) 11

Williams v. Mississippi, 170 U.S. 213 (1898) 11, 15, 18

Constitutions and Statutes

Page

United States Constitution:

- First Amendment 2
- Fourteenth Amendment 1, 2
- Fifteenth Amendment 1-5, 8-11, 13, 15-16, 19-21
- Nineteenth Amendment 4
- Twenty-fourth Amendment 4

Miscellaneous

Congressional Globe, 40th Cong., 3d Sess. (1869) 6-9

Congressional Globe, 41st Cong., 2d Sess. (1870) 9

Ogden, "The Poll Tax in the South" (1958) 16

1960 Census of Population, Vol. 1: Characteristics of Population, Part 48—Virginia 17

U. S. Civil Rights Commission, 1959 Report 12

U. S. Civil Rights Commission, 1961 Report 12

IN THE

Supreme Court of the United States

October Term, 1965

No. 655

EVELYN BUTTS,

Appellant,

v.

ALBERTIS HARRISON, GOVERNOR, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEES

STATEMENT

This case was consolidated below with *Harper* v. *Virginia State Board of Elections,* No. 48, O.T. 1965. It has been consolidated with *Harper* here. The issues are for the most part identical. The only material difference is that while appellants in *Harper* disclaim any reliance on the Fifteenth Amendment in attacking the Virginia poll tax requirement, Appellant in *Butts* relies mainly on the Fifteenth Amendment, even going so far as to duplicate her Fifteenth Amendment claim by recasting it in Fourteenth Amendment terms (Br. 21-31).* The Fifteenth

* Appellant's Brief will be hereinafter cited as Br.

Amendment is thus the only new issue and the only one meriting separate consideration.

The real party in interest as Appellee in both cases is the Commonwealth of Virginia, represented in *Harper* by the State Board of Elections and here by the Governor of Virginia. Since Appellant's First and Fourteenth Amendment arguments have been fully answered in *Harper,* we adopt those answers here and deal only with Appellant's resort to the Fifteenth Amendment.

This case was heard and decided below on a Motion to Dismiss (R. 14, 147), without any evidence from witnesses on the stand, but only a brief allusion by Appellant's counsel to the nature of the testimony they would give if called (without admission by Appellee's counsel of its truth or relevance) together with certain exhibits.

The question presented, then, is whether the requirement for payment of a poll tax of $1.50 a year as prescribed by the Constitution and statutes of Virginia denies or abridges the right of citizens to vote on account of race, color or previous condition of servitude.

SUMMARY OF ARGUMENT

1.

The Fifteenth Amendment Forbids Only the Conditioning of Suffrage on Race, Color or Previous Condition of Servitude

The Fifteenth Amendment was deliberately written in terms that do not limit the power of the States to determine suffrage requirements except with respect to the three particular matters enumerated. The only purpose of the Amendment was to prohibit conditioning the right to vote on race, color or previous condition of servitude. The legislative history clearly establishes that the framers of the Amendment did not intend to abrogate existing or future laws of

uniform application establishing property ownership, tax payment or educational qualifications as conditions for voting, even if these conditions should result in disfranchising many Negroes.

Judicial decisions under the Fifteenth Amendment show that it does not apply to State suffrage requirements unless by their language or administration they exclude Negroes as such from voting, or effectively and systematically impose burdens on the Negro voter that are not imposed on the white voter similarly situated.

2.

THE VIRGINIA POLL TAX DOES NOT VIOLATE THE FIFTEENTH AMENDMENT

The poll tax laws of Virginia are framed to apply uniformly to all persons without distinction as to race or color. These laws are administered fairly and equitably, without discrimination on the basis of race or color. There is not a shred of evidence in the record to show studied or systematic attempts by administrative officials to hinder or in any way discourage the assessment and payment of the tax by Negroes or to assist or in any way encourage the assessment and payment of the tax by whites. The court below was right in finding that no racial discrimination in the application of the tax has been shown.

Appellant contends that Virginia's poll tax laws are invalid solely because of the allegedly improper motives of certain outspoken members of the Constitutional Convention of 1902, which enacted the laws. This Court has long held that if a law is fair on its face and fairly administered (as the Virginia poll tax has been held to be), it is not rendered invalid by the motives of its draftsmen even though they were of evil nature.

Appellant also urges that the poll tax violates the Fifteenth Amendment because it constitutes "a special eco-

nomic impingement on Negroes." Her argument is based entirely on statistics allegedly showing that the proportion of Virginia non-whites in the lower income brackets is greater than the proportion of whites in the same brackets, and that the median income of Virginia non-whites is lower than that of whites. But there are three or four times as many Virginia whites as non-whites in the lower income brackets. If a poll tax of $1.50 a year actually deters impoverished persons from voting, it must deter a much larger number of whites than non-whites, just as many members of the 1902 Convention predicted. It does not, therefore, exclude Negroes as such or in any way condition the right to vote on race, color or previous condition of servitude so as to violate the Fifteenth Amendment.

Poll tax laws have been upheld by this Court since the Fifteenth Amendment was adopted; the meager record in this case certainly does not furnish any basis for overturning these established precedents. If there be some compelling reason for prompt elimination of the poll tax in State elections, this should be done by constitutional amendment as was done by the Twenty-fourth Amendment in Federal elections.

ARGUMENT

1.

The Fifteenth Amendment Forbids Only the Conditioning of Suffrage on Race, Color or Previous Condition of Servitude

(a) The Text

The text of the Fifteenth Amendment is quite clear and precise, so much so that it has been used as the model for the Nineteenth and Twenty-fourth Amendments:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or

by any State on account of race, color or previous condition of servitude."

The words are clear that the only purpose was to prohibit the United States and the States from conditioning the right to vote on race, color or previous condition of servitude. As intended by Congress, the Amendment immediately annulled the constitutional provisions of several of the States which then limited suffrage to white male citizens; it would have the same effect on any future constitutional or statutory provision of a State conferring the right to vote exclusively on a particular racial group or denying it to some other racial group. See *Guinn* v. *United States,* 238 U. S. 347, 363 (1915).

But there is no reference in the text to literacy tests, property and tax qualifications for voting or any other suffrage requirements of universal application that may or may not have some inconsequential effect on a particular racial group. This omission was calculated and deliberate, as the legislative history shows.

(b) Legislative History

The Fifteenth Amendment, introduced simultaneously in both houses of Congress, was originally proposed simply as a prohibition of discrimination based on race, color or previous condition of servitude.* While there was consider-

* The Amendment was introduced in the House as H.J. Res. 402:

"The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color or previous condition of slavery of any citizen or class of citizens."

It was introduced in the Senate as S.J. Res. 8:

"The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude."

able sentiment in Congress for an amendment conferring suffrage upon the Negroes, the Republicans, who commanded a majority in both Houses, differed widely as to the appropriate text. Representative Shellabarger, who favored universal male suffrage, stated that the Amendment as originally proposed was too limited. He pointed out that the original text

> "leaves to the States the power to make discriminations as to who shall vote. These discriminations may be on the score of either intelligence or want of property, or any other thing than the three things enumerated. . . ." Congressional Globe. 40th Cong., 3d Sess. (1869) (hereinafter cited as Globe) App. 97.

This, in his view, was a fatal defect, for it could result in the enactment of qualifications disfranchising substantial numbers of Negroes.

These criticisms of the limited nature of the original text led Representative Boutwell, who steered the Amendment through the House, to offer a modification that would have banned property or educational qualifications. Globe 726. But Boutwell refused to accept other proposals to expand further the scope of the original text because they would endanger State registration laws and "abolish those qualifications in some States which require the voter to pay a small capitation tax." *Ibid.* After further debate even the limited expansion offered by Boutwell was defeated by a vote of 45 yea to 95 nay. Globe 728. The next day, two broad and stringent substitute resolutions offered by Representatives Shellabarger and Bingham were also decisively defeated, and the Amendment was approved as originally submitted to the House. Globe 745.

Debate in the Senate on the House version, so modified as to protect the right to hold office as well as to vote, began

similarly on a critical note. Senator Warner asserted that this version of the Amendment was inadequate to achieve the ends in sight:

> "The *animus* of this amendment is a desire to protect and enfranchise the colored citizens of the country; yet, under it and without any violation of its letter or spirit, nine tenths of them might be prevented from voting and holding office by the requirement on the part of the States or of the United States of an intelligence or property qualification." Globe 862.

Senator Morton declared that although he would vote for the text before him, he was far from satisfied with it because

> "this language admits or recognizes that the whole power over the question of suffrage is vested in the several States except as it shall be limited by this amendment. It tacitly concedes that the States may disfranchise the colored people or any other class of people for other reasons save and except those mentioned in the amendment." Globe 863.

The remarks of Senator Frelinghuysen, a supporter of the original Senate text, show that the construction of the Amendment suggested by those who opposed it because of its alleged shortcomings was shared equally by its sponsors:

> "It does not take away from the States the right to regulate. It leaves the States to declare in favor of or against female suffrage; to declare that a man shall vote when he is eighteen or when he is thirty-five; to declare that he shall not vote unless possessed of a freehold, or that he shall not vote unless he has an education and can read the Constitution. The whole question of suffrage, subject to the restriction that

there shall be no discrimination on account of race, is left as it now is. . . ." Globe 979.

Later, Senator Wilson proposed an amendment to the House version, adding nativity, property, education and creed to the list of prohibited requirements. Globe 1014. His amendment was defeated by 24 nay to 19 yea, Globe 1029. He reintroduced it, immaterially changed, soon after. Globe 1035. This time it was approved by 31 yea to 27 nay, Globe 1040, and the House text, as so amended, carried the Senate. Globe 1044.

The Senate amendment was emphatically rejected by the House. Globe 1226. Over Wilson's objections, the Senate receded from its amendment, Globe 1295, but a motion to adopt the House version failed to receive the necessary two-thirds vote. Globe 1300. Debate then proceeded on the original Senate version. Senator Howard next offered an amendment affirmatively granting to citizens of African descent the same rights to vote and hold office as possessed by other citizens. Globe 1308. When it was observed that his amendment, like the original, would not outlaw qualifications based on property and education, Howard appeared to concur in this interpretation. Globe 1317. The Howard amendment was defeated, however, and the original Senate version was finally approved. Globe 1318.

When the Senate version came before the House, Representative Bingham moved to amend it by including nativity, property and creed among the prohibited requirements. Globe 1425. This amendment carried, and the Senate version, as amended, was passed. Globe 1428. But the Senate refused to concur in the House amendment. A conference was called. The result of the conference report was a bill in the terms of the present Fifteenth Amendment. Globe 1563. It was promptly passed by the House. Globe 1564. After

some members expressed their regrets that enactment of a more extensive measure had proven impossible, the Senate finally passed the Amendment. Globe 1641.

The foregoing history is necessarily abbreviated and touches only upon the salient features of the debates.* But it suffices to show that there is no foundation whatever for a contention that the Fifteenth Amendment was intended to prohibit property, tax and educational qualifications for voting solely because they might have the greatest effect upon impoverished and illiterate Negroes newly freed from slavery. It is clear that all attempts to expand the Amendment to prohibit such qualifications were decisively rejected by the Congress and the possibility of such requirements clearly recognized and permitted.

The members of the Fortieth Congress knew quite well that the States of Massachusetts, Vermont, Rhode Island, New York, Pennsylvania, Nevada and Georgia then required the payment of taxes or property ownership as conditions of voting. By their discussion of the proposed Amendment, they emphasized that these State voting requirements would be unaffected by its ratification.

There were extended debates in the Forty-first Congress over proposed legislation to enforce the Fifteenth Amendment, in which both opponents and proponents of the Amendment stressed its limited purpose and repeatedly stated that it did not reach any State restrictions or regulations of voting so long as they applied uniformly to all classes of citizens. *E.g.*, Congressional Globe, 41st Cong., 2d Sess. (1870) 599-600 (dialogue of Senators Howard and Stewart); 1363 (remarks of Senator Trumbull); 3667

* For a more detailed study, see Appendix to Brief of the Commonwealth of Virginia, Amicus Curiae, *South Carolina* v. *Katzenbach*, No. 22, Original, O.T. 1965.

(remarks of Senator Davis); 3872 (remarks of Representative Kerr).

(c) Judicial Decisions

The leading judicial decisions arising under the Fifteenth Amendment largely record the condemnation of various devices used to disfranchise the Negro, either overtly on the face of the statutes or covertly through discriminatory administration.

But these opinions also show that, absent proof of discriminatory administration, a poll tax requirement, literacy test or any other suffrage requirement drafted so as to apply alike to all persons must be held valid under the Fifteenth Amendment. This, of course, coincides with the clear intent of the framers as shown by the legislative history.

In *Guinn* v. *United States,* 238 U. S. 347 (1915), and *Lane* v. *Wilson,* 307 U. S. 268 (1939), the Court held invalid Oklahoma statutes that had the automatic and necessary effect of imposing upon all Negroes suffrage requirements from which most white persons were exempt.

In *Smith* v. *Allwright,* 321 U. S. 649 (1944), the "white primary," which had the automatic and necessary effect of excluding all Negroes from the nomination of candidates for public office, was held invalid.

In *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), it was held that (if proved) allegations that a State law aligning the boundaries of the City of Tuskegee in such manner as to exclude 99% of the Negroes from voting in municipal elections, but without eliminating a single white voter, are sufficient to invalidate the law under the Fifteenth Amendment.

Williams v. *Mississippi,* 170 U. S. 213 (1898) and *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959) held that literacy tests applicable to all persons were not unconstitutional in the absence of proof that they were administered so as to exclude Negroes. Following this reasoning, two recent cases invalidated requirements that a prospective voter "understand and explain" any article of the Constitution to the satisfaction of local registrars where it was shown that the statutes in question vested uncontrolled discretion in the registrars, and that the registrars used their powers systematically to refuse registration to otherwise qualified Negroes. *United States* v. *Louisiana,* 380 U. S. 145 (1965); *Schnell* v. *Davis,* 336 U. S. 933 (1949), *affirming per curiam* 81 F. Supp. 872 (S.D. Ala. 1949).

These cases and those dealing directly with Fifteenth Amendment arguments against the poll tax, which will be discussed below, compel the conclusion, again in accord with the scope and purpose of the Amendment as established by its legislative history, that the Amendment does not apply unless a particular suffrage requirement, either on its face or by its administration, excludes Negro voters as such or effectively imposes burdens on the Negro voter that are not imposed on the white voter similarly situated.

2.

The Virginia Poll Tax Does Not Violate the Fifteenth Amendment

(a) The Poll Tax Laws of Virginia Are Not Discriminatorily Administered

To dispel any inferences that might otherwise be drawn from Appellant's Brief, it is well to emphasize at the outset

that, regardless of what may be the case elsewhere* the poll tax laws in Virginia are administered fairly, equitably and without any regard to the race of the taxpayer and potential voter. Appellant (who was the Plaintiff below) introduced no evidence tending to prove otherwise; in fact, the only evidence in the record bearing on administration of the tax consisted of excerpts from the 1961 and 1959 Reports of the United States Commission on Civil Rights (Defendants' Ex's. 1-2), reading respectively:

> "The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States: Arkansas, Oklahoma, Texas, and Virginia." (1961 Report, p. 22).
>
> * * *
>
> "Finally, it may be noted that the poll tax is not as serious a restriction as it once was, for it is difficult to administer so as to bar Negroes alone from the ballot box. Any administrative procedure by which the tax would be exacted from the Negro alone would most certainly be invalidated by the Federal courts." (1959 Report, p. 118).

This equal justice under law has long been the practice in Virginia. In 1951 it was alleged in *Butler* v. *Thompson,*

---

* *Cf. United States* v. *Dogan,* 314 F. 2d 767 (5th Cir. 1963), arising under the Civil Rights Act of 1957, where it was shown that Mississippi Sheriffs, who were charged by statute with the collection of the poll tax, systematically discouraged payment of the tax by Negroes.

97 F. Supp. 17 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951), that the poll tax was manipulated so as to disfranchise Negroes. But after a full review of the evidence (including a broad survey of the practices of local officials introduced by stipulation), the court concluded:

> "There is not a shred of evidence in the record of this case showing either that any Negro so applying has been refused assessment or that any white person, duly assessable, has been permitted to vote without the payment of poll taxes. Nor does this record disclose, as plaintiff asserts, studied efforts on the part of Virginia tax officials to assess and compel white persons to pay capitation taxes so that they can vote and an equally studied failure on the part of these officials to do the same in the case of Negroes." 97 F. Supp. at 24.

In short, as the District Court below found in the pending case, "no racial discrimination is exhibited in . . . application [of the tax] as a condition to voting." 240 F. Supp. 270, 271.

Appellant attempts to side-step this finding by resorting to two arguments that, in combination, are said to bring the tax within the prohibition of the Fifteenth Amendment: (*i*) the motives of its framers were sinister (Br. 31-35), and (*ii*) the "economic actuality" of Negroes in Virginia makes the tax a special hardship on them (Br. 22-23, 35-36). We now show that neither argument is new but that both have been rejected, and rightly so, by this Court.

(b) The Motives of the Framers of the Poll Tax Requirement Are Irrelevant

In *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87, 131 (1810), Mr. Chief Justice Marshall declared:

> "If . . . a legislative act [be one] which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot entertain a suit . . . founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

Through the years this doctrine has become fundamental. See *Arizona* v. *California,* 283 U.S. 423, 455 n. 7 (1931). As the Court observed in *Tenney* v. *Brandhove,* 341 U.S. 337, 367 (1951),

> "The holding of this Court in *Fletcher* v. *Peck,* . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."

Thus the motives of the members of the Virginia Constitutional Convention of 1902 which enacted the poll tax, even if equated with those of the members of most extreme bias, *Harman* v. *Forssenius,* 380 U.S. 528, 543 (1964), which we think unrepresentative, may not be accorded constitutional significance and are indeed irrelevant. It was specifically so held in *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951). There the plaintiff, like Appellant here, urged that the Virginia poll tax must be declared unconstitutional because "the draftsmen of the Virginia Constitutional Convention were prompted by evil motives" (97 F. Supp. at 21). It was a sufficient answer for the court to say, as in *Fletcher* v. *Peck,* that

> "a law that is fair on its face and is also fairly administered is not rendered invalid by the evil motives of its draftsmen." *Ibid.*

The court in *Butler* also observed that, as pointed out in detail in the Brief for Appellees filed in *Harper,* pp. 40-42, if the motives of the delegates could be considered, it was by no means accurate to single out disfranchisement of Negroes as the sole or controlling motive of the Convention, and that even the most outspoken among the delegates insisted that any revisions of the suffrage requirements be kept within the limits of the Federal Constitution. Moreover it was pointed out on the floor that the tax, operating as a measure of minimum competence, would keep from the polls more whites than non-whites. In fact, the revisions agreed on by the Convention were indistinguishable in substance from the immediately preceding Mississippi suffrage provisions that this Court had just unanimously held constitutional and valid, in the face of allegations of the legislators' evil motives. *Williams* v. *Mississippi,* 170 U.S. 213 (1898).

The principle as well as the precedent merits respect. This Court sits to hold the operations of government within the framework of the Constitution, not to erect constitutional doctrine on such fugitive indications as may be derived by sifting motives of those long dead. If the validity of Virginia's poll tax under the Fifteenth Amendment is to be re-examined at this time, surely it is the actual operation and effect of the tax today that must be considered. It cannot be denied that the United States Civil Rights Commission is right in finding that currently the Virginia tax does not bar Negroes as such from voting. Nor does it bar a greater number of Negroes than whites, as we now show.

(c) The Economic Statistics Cited by Appellant Do Not Establish a Violation of the Fifteenth Amendment

Appellant's argument is only that in 1959 the proportion of Virginia non-whites in lower income brackets was greater than in the case of Virginia whites, and that the median in-

come for Virginia non-whites is lower than in the case of Virginia whites (Br. 21-22). It is said in consequence that the poll tax has "a very special impingement upon the Negro citizens of Virginia," (Br. 8), and thus denies them their Fifteenth Amendment rights.

Realistically, the amount of the tax—$1.50 a year—is so trivial that a claim of discrimination through its imposition merits dismissal as frivolous. There is certainly no reliable evidence in the record that anyone of any particular race is prevented from voting by the tax*.

---

* There is no live testimony in the record; only the recital by Appellant's counsel of what his witnesses would say on direct examination if called. (R. 47-48). It was stipulated by counsel for Appellees that these witnesses would so testify, but the truth and relevancy of their statements was not admitted. (R. 48). Of course, none of the witnesses was cross-examined. In these circumstances, the worth of their summarized testimony is, to say the least, doubtful. That of Mr. Brooks—to the effect that "people" of unspecified race have told him that they will not vote because they cannot pay the poll tax (R. 48)—is generalized hearsay of questionable weight. That of the Appellant Mrs. Butts—to the effect that she does not pay the poll tax because of her economic condition (R. 48)—is undermined by the fact that she paid the tax consistently up to the year she instituted litigation attacking it. (R. 42). Mrs. Butts instituted suit against these same Appellees on November 29, 1963; this action was dismissed for want of prosecution on May 18, 1964. *Butts* v. *Harrison*, Civ. No. 3912 (E. D. Va., May 18, 1964). The recital as to Dr. Ogden is inconsistent with the views he expresses in his extensive study of the tax:

> "Although it is logical that a tax on voting should be a greater deterrent to those at the bottom of the economic ladder than to those on higher rungs, the lower classes, judged economically, vote at the reduced rate in sections where there is no poll tax as well as where there is one. Studies of voting behavior have consistently disclosed that participation declines at each stage down the economic scale. Thus, the groups least able to pay a poll tax are also the ones least interested in voting. This fact undoubtedly helps to explain why tax repeal has not been followed by greater increases in turnout. The analysis also indicated that, as a result of higher incomes and reduced value of the dollar, the poll tax is no longer the economic burden that it once was and, therefore, a close relationship between income and poll tax payment may not exist." Ogden, "The Poll Tax in the South" 176 (1958).

Realistically also, votes are cast by people not by mathematical proportions. Appellant wholly ignores the numbers of persons concerned. The facts are shown in the following table, derived from Table 134 of the 1960 Census of Population, Vol. 1: Characteristics of Population, Part 48—Virginia:

PERSONS 20 YEARS OF AGE AND OLDER — 1959

Income	*Non-white*	*White*
No income	106,147	480,384
$1 — 999	139,442	294,716
$1000 — 1999	78,592	211,910
$2000 — 2999	54,507	197,763

As the table shows, there were more than four times as many whites as non-whites of approximate voting age having no income whatever. There were nearly three times as many whites as non-whites in the two lowest income brackets, and about four times as many whites as non-whites in the third lowest bracket. So, if there is any particular economic "impingement" in so slight a tax as $1.50 a year, it affects from three to four times as many whites as non-whites.*

* Other instances of misleading and irrelevant statistics abound in Appellant's argument. For example, great stress is laid on the median incomes of "families and unrelated individuals" in Virginia (Br. 12), but it is not pointed out that this phrase has a technical meaning devoid of significance for questions of voting. It does not purport to classify according to voting age, and by including "unrelated individuals" it includes such groups as students in dormitories, transients in hotels, motels and rooming houses, military personnel in barracks, and even the crews of ships docked in the port cities. See 1960 Census of Population, Vol. 1: Characteristics of Population, Part 48—Virginia, pp. xxvi-vii, xxviii. If there is any relevance in the statistics showing Federal expenditures in Virginia, (Br. 27-29), we fail to appreciate it. Certainly these statistics do not show that "voting is the key to economic improvement"; in fact, if they can be related to the gubernatorial vote at all, as Appellant's economic argument appears to suggest, it would seem that the smaller the vote, the greater the Federal outlay.

The Court has recently emphasized in *Reynolds* v. *Sims,* 377 U.S. 533 (1964) that "legislators represent people, not trees or acres"; that "legislators are elected by voters, not farms or cities or economic interests" (562); that "citizens, not history or economic interest, cast votes;" and that "people, not land or trees or pastures, vote" (580). If, as in *Reynolds* and the other reapportionment cases, the effect on numbers of voters is the decisive criterion in identifying discrimination, then numbers of voters may equally be the guide here instead of mathematical abstractions.

Any other view would invite a host of absurdities. For example, if it should be possible to show that proportionately more non-whites than whites are below the established voting age, then, according to the Appellant's theory, the age qualification violates the Amendment; if it should be possible to show that proportionately more non-whites than whites are convicted of felonies, provisions which disqualify criminals are likewise invalid; if it should be possible to show that the median income of married women or clergymen is less than other groups, this also might be an invidious and unconstitutional discrimination. Examples could be multiplied indefinitely.

In *Williams* v. *Mississippi,* 170 U.S. 213 (1898), the suffrage laws of Mississippi were challenged by a convicted Negro who alleged that, by making eligibility to vote a condition of serving on a jury and by so drafting the suffrage laws as to deny eligibility to Negroes, the State had unlawfully excluded Negroes from the grand jury that indicted him. Among the challenged laws were a poll tax requirement and a disqualification for crime, which were attacked not only on the ground of motive mentioned above but also on the ground that Negroes might be more often convicted and, having lately been freed from slavery, were

less able to pay the tax than whites. The Court rejected this attack:

> ". . . the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime." *Ibid.*

Likewise, in *Myers* v. *Anderson,* 238 U.S. 368 (1915), the Court considered a Fifteenth Amendment challenge to a municipal election law containing a "grandfather clause" and also limiting the right to vote to "all taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars." Although the Court, following the immediately preceding holding in *Guinn* v. *United States,* 238 U.S. 347 (1915), held the "grandfather clause" invalid and inseparable from the remainder of the law, it went out of its way to affirm the validity of the taxpaying limitation standing alone because

> "it contains no express discrimination repugnant to the Fifteenth Amendment and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice. . . ." 238 U.S. at 379.

The specific contention that a poll tax discriminatorily denies the privilege of suffrage to the poorer citizens was rejected and the tax sustained by the unanimous decision of this Court in *Breedlove* v. *Suttles,* 302 U.S. 277 (1937). *Accord, Saunders* v. *Wilkins,* 152 F. 2d 235 (4th Cir. 1945), *cert. den.,* 328 U.S. 870 (1946); *Pirtle* v. *Brown,* 118 F. 2d 218 (6th Cir.), *cert. den.,* 314 U.S. 621 (1941).

Similarly in *Butler* v. *Thompson,* 341 U.S. 937 (1951), *affirming per curiam* 97 F. Supp. 17 (E.D. Va.), the poll tax of Virginia was sustained against an attack by a Negro based on the Fifteenth Amendment. Appellant Butts now argues that the question of "discrimination as to economic class was not raised or at least, if raised, was not decided." (Br. 21). But Judge Dobie, who wrote the opinion below in *Butler,* and both his brethren on the bench as well as all the Justices of this Court, were well aware that in general Negroes had less income than whites and were therefore distinguishable in point of "economic class". What is obvious need not be said. The attack by a Negro in behalf of the race unmistakably raised the issue of "economic discrimination". The judges knew what they were deciding, they decided it unconditionally, and no less so because they were not faced precisely by Appellant's choice of adjectives and accent. The judgment has always been so understood. Every change of condition since that time, so far from increasing the concentration of poverty among Negroes as Appellants assert (Br. 8, 23), has in fact enlarged the opportunities and improved the economic position of the Negroes. The decision in *Butler,* being right on its merits and never questioned until this day, should be respected.

Admittedly, if one has nothing, he cannot pay anything. But this is an insubstantial ground on which to object to anything so slight as $1.50 a year. If its effect is greater on the poor man than the rich, this is an inequality not of law but of situation; such inequalities "are unavoidable; they do not originate in the law. They are not cases of intentional and arbitrary discrimination." *Sanchez Morales & Co.* v. *Gallardo,* 15 F. 2d 550, 552-53 (1st Cir. 1927). That the poor man may occasionally be non-white, as he is

once in every three or four instances in Virginia, provides no more occasion for a holding that the tax discriminates on account of race than for a holding that the exaction of fees for drivers' licenses, marriage licenses, or hunting or fishing licenses, all of which are fixed in amount, discriminate on account of race. The tax takes those liable for it as it finds them, and it is thus absolutely "neutral on race, creed, color and sex." *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45, 51 (1959).

Appellant's Fifteenth Amendment argument is thus both devoid of merit and contrary to repeated precedent of this Court. Today, the poll tax in Virginia, as emphasized by Judge C. H. Morrissett, Virginia's Tax Commissioner for the past 39 years, "provides a simple and objective test of certain minimal capacity for ordering one's own affairs and thus of qualification to participate in ordering the affairs of state." Brief for Appellees filed in *Harper,* App. A, p. 6. This function is acknowledged to be both legitimate and commendable. *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959). The Fifteenth Amendment has no application and the arguments by Appellant based on it add nothing new to the discussion in *Harper.*

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General

RICHARD N. HARRIS
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

GEORGE D. GIBSON
JOSEPH C. CARTER, JR.
Special Counsel

Attorneys for Appellees

HUNTON, WILLIAMS, GAY, POWELL
& GIBSON
1003 Electric Building
Richmond, Virginia 23212

December 30, 1965